Supreme Court, U.S.
FILED
AUG 22 1991
OFFICE OF THE CLERK

NO. 91-148

IN THE UNITED STATES SUPREME COURT

OCTOBER, 1991 TERM

EMILY L. LATIMER, Petitioner

v.

KENNETH L. STAINER, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

David A. Carpenter
Attorney at Law
4157 South Harvard, Suite 125
Tulsa, Oklahoma 74135
(918) 749-0050

ATTORNEY FOR REPSONDENT

QUESTIONS PRESENTED

I. Whether the Petitioner waived her rights to trial by jury before the United States Bankruptcy Court by not demanding same in writing.

II. Whether a conflict exists among the Circuits regarding the effect of failure to demand jury trial in the United States Bankruptcy Court timely and in writing.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATUTES AND RULES INVOLVED	iv
STATEMENT OF THE CASE	viii
SUMMARY OF ARGUMENT	xii
ARGUMENT AND AUTHORITIES	1
CONCLUSION	7
CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES

DECISIONAL AUTHORITY

Gasifier Mfg. Co. v. General Motors Corp., 138 F.2d 197 (8th Cir. 1943) 4

Gulbenkian v Gulbenkian, 147 F.2d 173, 158 A.L.R. 990 (2nd Cir. 1945) 3, 6

Jones v. Birdsong, 679 F.2d 24 (5th Cir. 1982) 4

Littlefield v. Ft. Dodge Messenger, 614 F.2d 581 (8th Cir. 1980), cert. den 445 U.S. 945, 63 L.Ed.2d 779, 100 S.Ct. 1342 4

Murphy v. Shelby, 353 F.2d 418 (8th Cir. 1965) 4

United States v. Moore, 340 U.S. 616, 95 L.Ed. 582, 71 S.Ct. 524 (1951), reh den 341 U.S. 923, 95 L.Ed. 1356, 71 S.Ct. 740 3

Wilson v. Corning Glass Works, 195 F.2d 825 (9th Cir. 1952) 3

RULES OF COURT

Fed.R.Bank.P. 9015 . . . . . 2, 5, 7

Fed.R.Civ.P. 38 . . . . . 3, 4, 7

STATUTES OR RULES INVOLVED

Fed.R.Civ.P. 38(b) and (d).

JURY TRIAL OF RIGHT

(b) DEMAND. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(d) WAIVER. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Fed.R.Bank.P. 9015 (abrogated March 30, 1987)

(a) *Trial by Jury.* Issues triable of right by jury shall, if timely demanded, be by jury, unless the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury.

(b) *Demand.*

(1) *Time; Form.* Any party may demand a trial by jury of any issue triable by a jury by serving on the other parties a demand therefor in writing not later than 10 days after service of the last pleading directed to such issue. The demand may be indorsed on a pleading of the party. When a jury trial is demanded it shall be designated by the clerk in the docket as a jury matter.

(2) *Specification of Issues.* In his demand a party may specify the issues which he wishes so tried; otherwise he shall be

deemed to have demanded trial by jury of all the issues so triable. If he has demanded trial by jury of only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues.

(3) *Determination by Court.* On motion or on its own initiative the court may determine whether there is a right to trial by jury of the issues for which a jury trial is demanded or whether a demand for trial by jury in a proceeding on a contested petition shall be granted.

(c) *Waiver.* The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5005 constitutes a waiver of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

(d) *Trial by the Court.* Issues not demanded for trial by jury shall be tried by the

court. Notwithstanding the failure of a party to demand a jury when such a demand might have been made of right, the court on its own initiative may order a trial by jury of any or all issues.

(e) *Advisory Jury and Trial By Consent.* In all actions not triable of right by jury the court on motion or on its own initiative may try and issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

(f) *Applicability of Certain of the Federal Rules of Civil Procedure.* Rules 47-51 of F.R.Civ.P. apply when a jury trial is conducted.

STATEMENT OF THE CASE

The Debtor, Caesar C. Latimer, filed a voluntary Chapter 7 petition with the United States Bankruptcy Court for the Northern District of Oklahoma on October 5, 1985, seeking relief from his creditors.

In May of 1985, the Debtor conveyed numerous parcels of real property to his wife, the Petitioner, Emily L. Latimer, both in her individual right and, ostensibly, in trust for the benefit of the said Emily L. Latimer and the Debtor's mother, Maria L. Latimer.

The Chapter 7 Bankruptcy Trustee, Kenneth L. Stainer, respondent herein, commenced an adversary proceeding in the United States Bankruptcy Court for the Northern District of Oklahoma on May 7, 1987, denominated Case Number 87-0055-C, for recovery from the Petitioner, some seven parcels which had been conveyed to her by her

husband in May of 1985, as above described.

Shortly following the filing of the adversary Complaint, the Trustee learned that immediately prior to commencement such adversary proceeding, Emily L. Latimer had conveyed several of the parcels of the property above mentioned to various family members of the Debtor. Upon motion, the Respondent sought leave to join such family members as additional parties Defendant, which request was granted by the Bankruptcy Court. Counsel for Emily L. Latimer, in open court, entered his general appearance on behalf of all such additional parties Defendant.

No written request for jury trial was ever filed by the Petitioner or any other additional party Defendant.

Trial was conducted in such adversary proceeding on April 11, 1988, with the Bankruptcy Judge, Honorable Stephen J. Covey, finding from the evidence that the Debtor had

conveyed all the subject parcels of real property to his wife, Emily L. Latimer, petitioner, and she to the other Defendants, fraudulently with respect to the creditors of the Debtor. The Bankruptcy Court further found that no consideration was received for such transfers and that the Respondent was able to avoid such transfers and recover for the estate, for the benefit of the Creditors, all parcels of real property conveyed by the Debtor in May of 1985. The Defendants below appealed first to the United States District Court for the Northern District of Oklahoma, Honorable Thomas R. Brett presiding, and thereafter to the United States Court of Appeals for the Tenth Circuit. In both instances, the decision and judgement of the tribunal appealed from were, in all respects, affirmed. A copy of the Per Curiam opinion of the United States Court of Appeals for the Tenth Circuit, and the Order of the United States Bankruptcy Court for the

Northern District of Oklahoma (affirming the Bankruptcy Court judge) are appended to the Petition for Certiorari by the Petitioner herein.

Of the Defendants to the Bankruptcy Court adversary proceeding, only Emily L. Latimer now seeks review by way of certiorari before this Court. A Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit was filed by the Petitioner, Emily L. Latimer, by and through her attorney, Caesar C. Latimer, who was coincidentally, the Debtor before the United States Bankruptcy Court, and from whose Chapter 7 Bankruptcy case this Petition for Certiorari directly arises.

SUMMARY OF ARGUMENT

I. The Petitioner waived her rights to jury trial by not following appropriate procedures to protect a right to jury trial.

II. There is no conflict among the Circuits as to the effect of waiver of right to jury trial by failure to timely demand the same in writing.

ARGUMENTS AND AUTHORITIES

I.

THE SINGLE ISSUE BEFORE THIS COURT ON CERTIORARI IS WHETHER THE PETITIONER WAIVED HER RIGHTS TO JURY TRIAL BY NOT FOLLOWING APPROPRIATE PROCEDURES TO PROTECT A RIGHT TO JURY TRIAL.

Notwithstanding the obfuscation engaged in by Petitioner, the sole issue before this Court is whether, assuming Petitioner had a right to trial by jury on the issues presented to the Bankruptcy Court, she nonetheless waived those rights by failure to properly demand jury trial in writing, as prescribed by the Federal Rules of Civil Procedure.

It is uncontested that the Petitioner failed to make a written request of any sort for trial by jury before the United States Bankruptcy Court for the Northern District of Oklahoma. The only such request by the Petitioner was made orally at the pre-trial conference, held by Honorable Stephen J. Covey, the trial judge in the Bankruptcy

Court.

There has never been a written demand for trial by jury filed in any of the proceedings leading up to this request for review by the Petitioner. Further, although not properly reviewable by this Court as having never been submitted to any prior tribunal (either for trial purposes or on appeal), the Plea in Abatement, mis-named Plea in Statement in the Appendix accompanying the Petition for review before this Court, fails to make request for jury trial.

The issue before the Court in this matter is not whether bankruptcy courts generally have the power to conduct jury trials, as is suggested by the Petitioner, but rather, whether the Petitioner failed to preserve what rights to jury trial she had by failing to make proper demand for jury trial in accordance with Federal Rule of Bankruptcy Procedure 9015 (abrogated March 30, 1987) and

Fed.R.Civ.P. 38(b).

This Court has long ago determined any right to jury trial is waived where no demand for such trial has been made as required by Fed.R.Civ.P. 38(b). See, United States v. Moore, 340 U.S. 616, 95 L.Ed. 582, 71 S.Ct. 524 (1951), reh den 341 U.S. 923, 95 L.Ed. 1356, 71 S.Ct. 740.

Petitioner further suggests that if a waiver of her rights for trial by jury occurred, such was occasioned by inadvertence and was not a "knowing" act of the Petitioner or her counsel.

This issue is without merit, as courts have uniformly held that the right to jury trial is waived by inaction, even though such inaction is due to ignorance of the provisions of Fed.R.Civ.P. 38. See, Wilson v. Corning Glass Works, 195 F.2d 825 (9th Cir. 1952), Gulbenkian v Gulbenkian, 147 F.2d 173, 158 A.L.R. 990 (2nd Cir. 1945).

A case is properly tried by the Court as

a "jury-waived" case where the record does not show there was any demand for jury trial in compliance with Fed.R.Civ.P. 38(b). See, Gasifier Mfg. Co. v. General Motors Corp., 138 F.2d 197, (8th Cir. 1943), Murphy v. Shelby, 353 F.2d 418 (8th Cir. 1965).

The Petitioner may not argue on appeal that the trial court improperly denied her the right to trial by jury, as to claims properly triable to a jury, where she never served a written demand for trial by jury as required by Fed.R.Civ.P. 38(b). See, Jones v. Birdsong, 679 F.2d 24 (5th Cir. 1982). If a petitioner does not make written demand for jury trial as required by Rule 38(b), such inaction constitutes waiver of trial by jury. See, Littlefield v. Ft. Dodge Messenger, 614 F.2d 581 (8th Cir. 1980), cert. den 445 U.S. 945, 63 L.Ed.2d 779, 100 S.Ct. 1342.

Thus, it is abundantly clear that this Court is not called upon to review the issue of whether a jury trial may be conducted by

a bankruptcy court, a non-Article III tribunal, but rather, whether the Petitioner, by failing to serve written demand for trial by jury as required by the applicable Federal Rule of Civil Procedure and the now abrogated Bankruptcy Rule (Rule 9015), waived whatever rights to trial by jury she may have had with respect to the adversary proceeding initiated by the bankruptcy trustee for avoidance of the fraudulent conveyances.

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO THE EFFECT OF WAIVER OF RIGHT TO JURY TRIAL BY FAILURE TO TIMELY DEMAND THE SAME IN WRITING.

The Petitioner attempts to further bootstrap her inadequate petition for review before this Court by attempting to establish that a conflict exists among the circuits regarding the power of a bankruptcy court to conduct trial by jury.

This non-issue is a smokescreen and blind on the part of the Petitioner. Whether or not such conflict exists, it need not be decided by this Court in this matter, for the reason that the Petitioner waived whatever rights she may have had to jury trial by failure to demand the same in writing timely.

The speculation found in page fourteen of the Petition for Writ of Certiorari before this Court (that the result might have changed had this action been initiated within the geographical confines of the Second Circuit) is specious, as the Second Circuit has previously held that waiver of right to jury trial occurs when litigants fail to properly perfect such right by timely written demand therefor. See, Gulbenkian v. Gulbenkian, supra.

This Court need not decide any conflict among the circuits to adequately dispose of the matter presently before it.

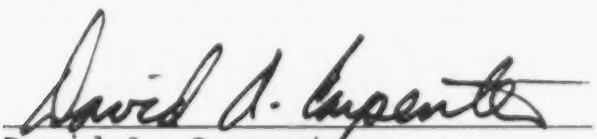
CONCLUSION

The Petition for Writ of Certiorari should be denied. The Petitioner waived her rights to trial by jury by failure to avail herself of the clear provisions set forth in Fed.R.Civ. P 38(b) and Bankruptcy Rule 9015 (abrogated).

There is no conflict among the circuits regarding the effect of waiver to demand jury trial properly.

No justifiable reason has been advanced by the petitioner as to why this Court should undertake further review of this matter.

Respectfully submitted,



David A. Carpenter
4157 South Harvard, Suite 125
Tulsa, Oklahoma 74135
(918) 749-0050

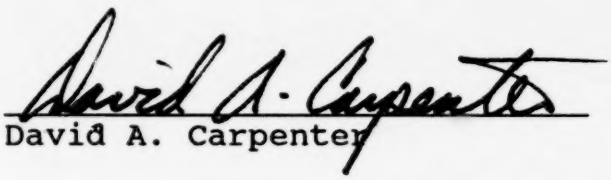
ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I, David A. Carpenter, do certify that on the 21st day of August 1991, I caused to be served upon the below named persons, three copies each of the foregoing Brief in Opposition to Petition for Writ of Certiorari:

James O. Goodwin
624 East Archer
P.O. Box 3267
Tulsa, OK 74101

Caesar C. Latimer
2611 North St. Lewis
Tulsa, OK 74106



David A. Carpenter